

## EMPLOYMENT FOR THE SCHOOL EMPLOYEES FUND

This information sheet has been developed to assist public school districts and community colleges in determining if a worker is an employee of the school employer or if the worker is an independent contractor. Statutory exclusions from employment that may pertain to the school employer are also listed.

### Common Law Employment

An employer-employee relationship exists when a person who hires an individual to perform services has:

- the right to discharge the worker at will without cause and/or
- the right to control the manner and means of how the services are performed.

Some indications of the employer's right to control over the worker include the following:

- Instructions — A worker who is required to comply with instructions about when, where, and how to work is ordinarily an employee. Some employees may work without receiving instructions because they are highly proficient and conscientious workers. Even if no instructions are given, the control factor is present if the employer has the right to give instructions.
- Training — Training of a worker by an experienced employee working with him or her, by correspondence, by required attendance at meetings, and other methods is a factor of control indicating that the employer wants the services performed in a particular manner.
- Order of Sequence Set — If a person must perform services in the order or sequence set by the employer, it shows that the worker is not free to follow an independent pattern of work. Often the employer does not set the order of the services because of the nature of the occupation. Control is sufficient if the employer retains the right to do so.
- Reports — The submission of regular oral or written reports indicates control since the worker must account for his or her actions.
- Services Rendered Personally — If the services must be rendered personally, it indicates the employer is interested in the methods, as well as the results.

- Hiring Assistants — An employee works for an employer who hires, supervises, and pays assistants. If an employee hires and supervises assistants at the direction of the employer, he or she is acting as an employee in the capacity of a representative of the employer.
- Working Hours — The establishment of set hours of work by the employer indicates control.
- Full-time Work — Full-time work for the business is indicative of control by the employer since it restricts the worker from doing other gainful work. Full-time does not necessarily mean an eight-hour day or a five-day week. An employee may perform services on a less than full-time or permanent basis and still be a common law employee. The law does not exclude services from employment which are commonly referred to as part-time help, probationary, replacements, overtime, and extra summer work.
- Place of Work — Doing the work on the employer's premises, or on a route, or at a location designated by an employer implies employer control, especially where the work is of such a nature that it could be done elsewhere. The use of desk space, and of telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision unless the worker has the option as to whether he or she wants to use these facilities. However, the fact that work is done off the premises does not indicate freedom from control since some occupations, for example employees of construction contractors, are necessarily performed away from the premises of the employer.

If it cannot be readily determined whether the person who hires the worker has the right to direct and control the manner and means of accomplishing the work, the following secondary factors are taken into consideration:

- What is the extent of control the employer may exercise over the details of the work? — In order to establish an employment relationship, it is not essential to actually control the workman in every detail. The principal test is the existence of a right of complete and authoritative control, not the extent of its exercise.
- Is the one performing the services engaged in a distinct occupation or business? — If a worker performs service for only one person, does not advertise his or her services to the general public, does not hold licenses or

hire assistants, and performs services on a continuing basis, it is an indication of an employment relationship. It is possible for a person to work for a number of people or firms and still be an employee of one or all of them because he or she works under the control of each firm.

- Is the work in the locality for this occupation usually done under the direction of the principal or by a specialist without supervision? — If the work is traditionally done under the direction of a supervisor, it is an indication of employment.
- What skill is required in the particular occupation? — A low level of technical skill is strong evidence of employment since, as the skill declines, there is less room to exercise the discretion necessary for independence.
- Does the principal or the workman supply the instrumentalities, tools, and place of work for the person doing the work? — If the employee's investment in the work is insignificant and the employer furnishes all the necessary facilities such as the equipment and premises, it indicates an employment relationship. The furnishing of tools, materials, etc., by the employer indicates control over the worker. If it is customary in some occupations and industries for individuals to provide their own tools, which are usually small hand tools, the workers may also be considered employees.
- What is the length of time the services are to be performed? — The existence of a continuing relationship between an individual and the person for whom he or she performs services indicates an employer-employee relationship. If the arrangement consists of continuing or recurring work, the relationship is considered permanent, even if the services are rendered on a part-time basis, are seasonal in nature, or if the person actually works for only a short time.
- Is the method of payment by the time or by the job? — Payment by the hour, week, or month represents an employer-employee relationship. Payment of the worker's business and travel expenses by the employer indicates control over the worker. When workers are insulated from loss or are restricted in the amount of profit they can gain, they usually are employees. The opportunity for higher earnings, such as from pay on a piecework basis or the possibility of gain or loss from a commission arrangement, is not considered profit or loss. The right to quit at any time without incurring liability indicates an employer-employee relationship.
- Is the work part of the regular business of the principal? — If the individual's services are so integrated into an employer's operations that the success or continuation of the business depends on the performance of the services, it generally indicates employment.
- Do the parties believe they are creating a relationship of employment? — The belief of the parties is considered in determining the relationship, but the actual details of the

relationship are more important factors. A written contract stating that the worker is an independent contractor will not change the relationship to independence if it is in actuality one of employment. Consideration is given to the fact that many individuals do not know how an employee determination is made and believe they are independent contractors because they are told they are.

- Can the worker make business decisions which would enable the worker to earn a profit or incur a financial loss? — Employees make business decisions on behalf of their employer; however, the employer can overturn the worker's decision. Business decisions can impact the profit or loss of a business investment. Loss of the worker's time is not considered a sufficient investment to show a risk of loss. Independent contractors have a risk of financial loss beyond that of losing payment for service.

The following cases are examples of individuals who were originally engaged as independent contractors but were held to be employees under common law by the California Unemployment Insurance Appeals Board (CUIAB).

In case SF-4P-4400, a substitute teacher in the school district was to supervise the painting of a mural on the exterior walls of a school. The employer treated the teacher as an independent contractor for purposes of accounting and did not make deductions. The personnel and accounting people who prepared the contract fully believed that the relationship between the teacher and the school was to be as an independent contractor rather than as an employee; however, this type of relationship never occurred. In reality the teacher was hired with limited funds to perform an extensive project under the control and supervision of the principal at the school just as though the claimant was another employee of the school district. Although the contract called for a lump sum payment, the teacher submitted invoices for payments based on an hourly wage. The teacher's hours were set by the principal. The teacher supplied all of the paint, half the brushes, and two-thirds of the chalk used for the project. Throughout the entire duration of the project the principal constantly oversaw the work. He suggested to the teacher that she appear in each of the classes and express to the students what the themes should be for the various scenes. Thereafter, the students would submit the drawings; the best were to be presented to the teacher to be included in the mural. Before the teacher could commence working on the mural itself, she was required to submit a sketch outlining the work in its entirety. The principal and director finally approved the outline. After the project began, the principal would always request the teacher to correct any work the children did which did not appear within the outlines.

In S-T-20609-0001, payments were made to participants under a grant of federal funds. The money paid to each participant was designated in the contracts as "stipends." The contracts required that the individuals work a certain number of hours to receive a set payment. The participants in the program were college students who had agreed to enter the teaching profession and who were also children of migrant workers. The CUIAB held that "stipends" were payments for personal

services and not scholarships. The participants worked during the school year as teaching assistants and aides in classrooms and should be considered employees the same as other nonparticipant teaching assistants and aides are considered employees and are paid wages.

In case SF-T-6541, former full-time employees who performed services after their retirement in connection with the petitioner's early retirement program were held to be employees. The retirees could not teach in classrooms as they had formerly done and receive retirement payments under the early retirement program. Therefore, the retirees' duties varied from rendering legal services for the school district, to providing musical dance programs for elementary students, to working in various capacities with the district-owned radio station.

### **Independent Contractors**

The common law factors are also used to determine if a worker is an independent contractor. Independent contractors control the manner of performance of the services and contract for the results of the work and not the means by which it is accomplished. Independent contractors are engaged in separately established bona fide businesses. They negotiate to perform specific jobs for prices agreed upon in advance and generally contract with more than one business. They pay expenses incurred in connection with the work and have an investment in equipment, materials, or other facilities used in their business, other than transportation. They can hire, direct, and pay assistants. Independent contractors typically can invest significant amounts of time or capital in their work without any guarantee of success. Their success or failure depends on the relation of their receipts to their expenditures. They have continuing and recurring liabilities or obligations. Whether a profit is realized or a loss is suffered generally depends upon their management decisions. Contractors responsible for a profit or loss can use their own ingenuity, initiative, and judgment in conducting the business or enterprise.

The following individuals were determined to be independent contractors:

- An attorney who had his own practice and defended the school district at a hearing.
- Individuals who traveled around the state providing training sessions for teachers at many school districts, were paid a lump sum for their work, usually worked only one session, and were not supervised.
- Individuals who took care of children in their homes under the Child Care Preschool Program which was funded in part by the school district were determined to be self-employed.
- Amateur athletic officials if the school district has no control over the official's decisions during a contest. See DE 231AA.

### **Statutory Exclusions From Employment**

Certain services performed for public entities are excluded from employment for the purpose of unemployment insurance. Remuneration paid for the following services is not reportable on the wage detail or magnetic tape, nor on the DE 9423, Quarterly Contribution Return, unless an election is filed with the Employment Development Department to cover the excluded services for unemployment insurance. Generally, these excluded services that may pertain to the school employer are:

1. Services performed by an elected official.
2. Services performed by an individual in a position which is designated under or pursuant to state law as either (1) a major nontenured policymaking or advisory position or (2) a policymaking or advisory position that ordinarily does not require more than eight hours a week to perform the duties.
3. Services performed by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of either (1) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or (2) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market.
4. Services performed by an individual receiving work-relief or work-training which is part of a program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof.
5. Services performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.
6. Services performed by an individual who is engaged to sell newspapers or magazines at a fixed price to ultimate consumers under an arrangement where the individual retains the difference between the fixed price minus the amount he or she is charged for the newspapers or magazines.

(The services are excluded even if the individual is guaranteed a minimum amount of compensation or is entitled to be credited with the unsold newspapers or magazines turned back.)

7. Services performed in the employ of a school, college, or university, if such service is performed by (1) a student who is enrolled and is regularly attending classes at such school, college, or university, or (2) by the spouse of such a student, if the spouse is advised, at the time the spouse commences to perform the service that the employment is provided under a program to provide financial assistance to the student by the school, college, or university, and the employment will not be covered by a program of unemployment insurance or disability compensation. (The exclusion does not apply if the student is working during the summer recess or after graduation and is not

concurrently enrolled or attending classes during that period. The exclusion does not apply if the student is performing services for a student body association or another school that is determined to be a separate employing unit.)

8. Services performed by a full-time student employed by an organized camp as defined in Section 18897 of the Health and Safety Code and Section 3306(c) (20) of Title 26 of the United States Code.
9. Services performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law.
10. Services performed by a student under the age of 22 in a work experience program which has been certified by an institution where the student is enrolled that the work experience is an integral part of a full-time program which is taken for credit at a nonprofit or public education institution which combines academic instruction with work

experience. The institution where the education activities are located must normally maintain a regular faculty and curriculum and have a regularly organized body of students. The exemption does not apply if the program is established for or on behalf of an employer or group of employers.

California personal income tax is required to be withheld on items 1 through 4 and items 7 through 10, while item 5 can have voluntary withholding if both the employer and employee agree. These items are listed under "Statutory Exclusions From Employment" and the remuneration paid is reportable as wages on the Form W-2, Wage and Tax Statement.

#### **Assistance**

For assistance or additional information, please contact the Employment Tax Customer Service Office nearest you. Offices are listed in the State Government Section of the telephone book under Employment Development Department, Employment Tax Information.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities.